No. 04-194

In the Supreme Court of the United States

BRYAN P. HALL,
Petitioner

v.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Pennsylvania Board of Probation and parole's application of the 1996 amendment to the Parole Act to an inmate sentenced before the effective date of the amendment violates the *Ex Post Facto* Clause of the U.S. Constitution?

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STATEMENT OF THE CASE

In 1996, the Pennsylvania General Assembly amended the language of the introductory section of the Pennsylvania Parole Act. The Supreme Court of Pennsylvania, construing this amendment, held that this change in the statute's language did not change it in substance, and accordingly held that its retroactive application does not violate the Constitution's *Ex Post Facto* Clause. Petitioner seeks review by this Court on the theory that this holding is not only wrong, but conflicts with a holding of the Court of Appeals for the Third Circuit on the same issue.

It is certainly true that the Pennsylvania Supreme Court and Third Circuit have each addressed the *ex post facto* issue presented by the 1996 amendment in a series of cases, in which each court has commented upon the decisions of the other, as well as upon its own earlier decisions. This "conversation" between the two courts, however, has not — at least not yet — hardened into a confrontation, nor, we think, has the last word in that conversation yet been spoken. To explain why, we first discuss the statutory provisions which form the backdrop for the ex post facto issue, and then the various state and federal decisions which have addressed it.

1. Parole in Pennsylvania is governed by the Probation and Parole Act, Pa. Stat. Ann., tit. 61, §§ 331.1 through 331.34a (Purdon 1999) ("Parole Act"). Enacted in 1941, the Parole Act establishes the Board of Probation and Parole, which among other things has the "exclusive power to parole and reparole" all persons sentenced to two years or more of imprisonment. *Id.*, § 331.7.

Prisoners are not eligible for parole until they have served their minimum sentence. *Id.*, § 331.21 (a). In

deciding whether to grant a parole, the Board is to inform itself of the prisoner's complete criminal record, conduct while in prison, and "physical, mental and behavior condition and history"; and the Board is to consider "the nature and circumstances of the offense committed," any recommendations of the trial judge and prosecutor, and "the general character and background of the prisoner." *Id.*, § 331.19. In addition, a member or designee of the Board must have "seen and heard" the prisoner "in person" before granting or denying parole. *Id.*, § 331.22.

But within these limits, the Parole Act confers unfettered discretion upon the Board. The Board, "in [its] discretion," may release on parole any prisoner "whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." *Id.*, § 331.21. Thus, "the granting of parole is wholly discretionary" with the Board, *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001); "a prisoner has only a right to apply for parole ... and to have that application considered by the Board." *Rogers v. Bd. of Probation and Parole*, 724 A.2d 319, 321 n.2 (Pa. 1999). Since the legislature "has conferred upon the Parole Board *sole* discretion" to grant or deny paroles, *Rogers*, 724 A.2d at 322 (emphasis added), the grant or denial of parole is not ordinarily subject to judicial review by the Pennsylvania courts. Those courts will, however, entertain an action in mandamus to compel the Board to exercise its discretion, *see, e.g., Marshall v. Bd. of Probation and Parole*, 638 A.2d 451 (Pa. Cmwlth. 1994), or to assert a *constitutional* challenge to the denial of parole. *Coady v. Vaughn, supra* (claim of *ex post facto* violation may be addressed in mandamus action).

Petitioner's *ex post facto* claim centers around an amendment to Section 1 of the Parole Act. Until 1996, Section 1 read as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Act of August 6, 1941, P.L. 861, § 1, *formerly codified at* Pa. Stat. Ann., tit. 61, § 331.1 (Purdon). In 1996, Section 1 was amended to read:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek *to protect the safety of the public.* In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Pa. Stat. Ann., tit. 61, § 331.1, *as amended by* Act of December 18, 1996, P.L. 1098, No. 164, § 1 (emphasis added).

This amendment to Section 1 did not alter the conditions of eligibility for parole, *see id.*, § 331.21, nor did it alter the matters which the Parole Board was required to consider in deciding parole applications, *see id.*, § 331.19, nor did it alter the Board's authority to grant parole "in [its] discretion." *Id.*, § 331.21.

2.a. Accordingly, the Supreme Court of Pennsylvania has repeatedly held that this change in the language of Section 1, and particularly the addition of language regarding the protection of the public safety, did not betoken any change in the statute's substance. The Supreme Court first addressed this issue in *Winklespecht v. Bd. of Probation and Parole*, 813 A.2d 688 (Pa. 2002):

> Although the language concerning "protect[ing] the safety of the public" and "assist[ing] in the fair administration of justice" was added to § 331.1 in 1996, these concepts are *nothing new* to the parole process and have *always* been underlying concerns. Both versions of § 331.1 leave the decision regarding the grant of parole within the discretion of the Board; the fact that some language was added in 1996, which clarified the policy underlying the parole process, does nothing that increases ... punishment.

Winklespecht v. Bd. of Probation and Parole, 813 A.2d 688, 692 (Pa. 2002) (plurality opinion) (emphases added). The Supreme Court therefore concluded that the change to Section 1 does not violate the *Ex Post Facto* Clause. *Ibid*; *accord id.*, at 693 (Castille, J., concurring) ("fully agree ... that the *ex post facto* claim

... is entirely meritless); *id.*, at 696 (Saylor, J., concurring and dissenting) (pre-amendment statutory provisions "manifestly subsume public safety, as well as the fair administration of justice"). The Supreme Court later adopted the analysis of the *Winklespecht* plurality by a clear majority in *Finnegan v. Bd. of Probation and Parole*, 838 A.2d 684 (Pa. 2003).

b. In the meantime, the Third Circuit was also confronting this issue. A few weeks after the state Supreme Court decided *Winklespecht*, the Third Circuit issued its decision in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), *cert. denied sub nom. Gillis v. Hollowell*, — U.S. — (2003). In *Mickens-Thomas*, the Third Circuit held that the Board had reacted to the 1996 amendment to Section 1 by applying a more stringent parole policy than had been the case before, and that this new policy violated the *Ex Post Facto* Clause. *Id.*, 321 F.3d at 375, 377-380, 383-386. The Third Circuit recognized that, in *Winklespecht*, "the Pennsylvania Supreme Court had held that [the 1996 amendment] does not change Pennsylvania policy as to the criteria for parole." *Id.*, at 391. The Third Circuit did not disagree with this holding, resting as it did upon the state Supreme Court's construction of a state statute, but found it irrelevant to its analysis, which rested instead on the Board's pre-*Winklespecht understanding* of the 1996 amendment:

> This [*Winklespecht*] decision, made after the Board's actions ... came too late to alter the Board's view of the statutory amendment on the outcome of this case. Not having the benefit of the [Pennsylvania] Supreme Court decision, ... *[t]he Board mistakenly construed the 1996 statutory change to signify a substantive change in its parole function.* ... The Board's actions ... [were] uninfluenced by

> the subsequent Court interpretation of the statute.

Ibid (emphasis added). Thus, the Third Circuit in *Mickens-Thomas* did *not* hold that the 1996 amendment itself violated the *Ex Post Facto* Clause, but held merely that the Board had done so through its mistaken interpretation of that amendment.

Later Third Circuit decisions discussing *Mickens-Thomas*, however, clouded this distinction. In *Hollowell v. Gillis*, 65 Fed.Appx. 809, 2003 WL 1919371 (3d Cir. 2003) (not precedential), *cert denied*, — U.S. — (2003), another Third Circuit panel said that "*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto* Clause," *id.*, at 816, *7, and on the strength of this reading of *Mickens-Thomas* declined to follow *Winklespecht*. *See also McLaurin v. Larkins*, 76 Fed.Appx. 415, 416, 2003 WL 22147497 (3d Cir. 2003) (not precedential) ("*Mickens-Thomas* ... held that the retroactive application of the 1996 amendment to Pennsylvania's Parole Act's statement of public policy violated the *Ex Post Facto* Clause"). These decisions, however, having been designated "not precedential," do not bind subsequent panels of the Third Circuit, *see* 3d Cir. Int. Op. Proc. 5.1, 5.7; moreover, not all Third Circuit decisions have adopted this reading of *Mickens-Thomas*. *See, e.g., Hart v. Bd. of Probation and Parole*, 82 Fed.Appx. 276, 277-278, 2003 WL 22838381 (3d Cir. 2003) (discussing *Mickens-Thomas* holding in terms of the Board's "understanding" of the 1996 amendment).

This brings us to petitioner's case.

3. Bryan P. Hall, the petitioner, is a state prisoner sentenced on September 13, 1991 to a term of from four to twenty years for aggravated assault, aggravated

indecent assault, and related charges. In decisions dating back to 1995, the Parole Board repeatedly denied his parole applications. Pet. App. 3a-4a. Petitioner brought a mandamus action in Pennsylvania's Commonwealth Court against the respondent, the Pennsylvania Board of Probation and parole, claiming that applying the 1996 amendments to his applications for parole violated the Constitution's *Ex Post Facto* Clause. The Board moved for summary relief, and Commonwealth Court granted the motion, concluding that the amended statement of policy in the Parole Act did not create any substantive rights, and that a Parole Board form containing parole guidelines was not a "law" for purposes of the *Ex Post Facto* Clause. Pet. App. 25a-26a.

Petitioner appealed to the Pennsylvania Supreme Court, which described his claim as follows:

> Hall contend[s] that the 1996 amendments to the Parole Act *materially changed the criteria* for granting and denying parole, and that application of the amended Parole Act to his parole requests violated the constitutional prohibition against *ex post facto* laws.

Pet. App. 4a (emphasis added). This, the court said, was the "exact question," Pet. App. 6a, which it had already decided in *Winklespecht v. Pennsylvania Board of Probation and Parole, supra* and *Finnegan v. Pennsylvania Board of Probation and Parole, supra*; and the court held that Hall's claim was foreclosed by the holding of those cases that the 1996 amendment added "nothing new" to the parole process. Pet. App. 6a-7a.

The Supreme Court then discussed the Third Circuit's decision in *Mickens-Thomas v. Vaughn, supra*, as well as the gloss placed upon *Mickens-Thomas* by *Hollowell v. Gillis, supra*, and *McLaurin v. Larkins,*

supra. Pet. App. 8a-14a. The Supreme Court thought that *Mickens-Thomas* had decided the "identical substantive contention" as *Winklespecht*; but had simply refused to follow its lead: "[t]he Third Circuit rejected the determination of this Court in *Winklespecht*...." Pet. App. 8a. The Supreme Court, relying on principles of *stare decisis* and federalism, held that it was not bound by the Third Circuit's decision, and declined in its turn to follow the lead of *Mickens-Thomas*.

REASONS FOR DENYING THE WRIT

1. The petition rests on the assertion that the Court ought to hear this case in order to resolve a direct and irreconcilable conflict between the Pennsylvania Supreme Court and the United States Court of Appeals for the Third Circuit in their evaluation of claims that amendments to the State Parole Act in 1996 violate the *Ex Post Facto* Clause when applied to prisoners whose crimes predate the amendments. The two courts have reached opposite conclusions, petitioner says, adding that the state supreme court ought to have deferred to the federal court of appeals.[1]

We believe the petition is premature. As we have explained, the Court of Appeals' decision in *Mickens-Thomas* does *not* directly conflict with the *Winklespecht* line of cases, although the Pennsylvania Supreme Court may well have been misled into thinking that it did by the gloss on *Mickens-Thomas* in some of the Court of Appeals' unpublished opinions.

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[1] Petitioner also argues that the decisions of the state court are substantively wrong, conflicting with *Garner v. Jones*, 529 U.S. 244 (2000), a decision which he says requires the court to entertain proof by a prisoner that an amended law increases the likelihood that he will serve more time in prison. *Garner* is distinguishable on the facts, since it involved a decrease in the frequency of parole reconsideration hearings for inmates serving life sentences from every three years to every eight years. The Court recognized that during the period between parole reviews, the Parole Board would not exercise its discretion at all, and thus, on its face, it appeared that the change could increase the likelihood of a longer sentence. *Garner* certainly did not say that an inmate must be permitted to show whether an amended law increase the likelihood of his serving a longer term where the amendments amount to no more than a rewording of existing law, and make no substantive or procedural change, as the Pennsylvania Supreme Court has said is the case here.

The Pennsylvania Supreme Court has certainly said that the 1996 amendments to the Parole Act do not support an *ex post facto* claim, in part because they have effected no change in the state law. The Court of Appeals, however, has not placed itself squarely at odds with this view in *Mickens-Thomas*, focusing instead on the Parole Board's perception of the effect of the amendments.

Thus, there is not yet the direct conflict between state and federal courts that petitioner claims, and the Court ought to want to see whether a direct conflict develops. There are currently cases pending before the Court of Appeals in which it will resolve the issue, either deferring to the State Supreme Court's interpretation of the state statute, or placing itself in direct conflict with it. If a direct conflict develops in any of those cases, we will petition the Court to resolve it.

2. The petition is premature and the conflict it presents illusory for another reason. Having exhausted his *ex post facto* claim in the state courts, the petitioner's next step is not to petition this Court to decide the issue, sidestepping the procedure Congress has in place for handling such claims, but to proceed via 28 U.S.C. §2254 by filing a petition for writ of habeas corpus. In habeas proceedings, it is the federal courts that defer to state court judgments and not, as petitioner here argues, vice versa. The Act provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

Petitioner must now pursue his habeas remedy in federal court, and if, at the end of that process, the decision of the Court of Appeals presents a direct conflict with that of the Pennsylvania Supreme Court, a petition for certiorari will be appropriate.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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